

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES TERRELL JONES,

Defendant-Appellant.

UNPUBLISHED
February 28, 2012

No. 300627
Wayne Circuit Court
LC No. 03-013861-FC

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right after being resentenced to a term of 3 to 20 years' imprisonment for first-degree home invasion, MCL 750.110a(2), which was ordered to be served consecutively to concurrent prison terms of 10 to 15 years each that were previously imposed for two convictions of armed robbery, MCL 750.529. We vacate defendant's sentence for first-degree home invasion and remand for resentencing.

This case is before this Court for the third time. Defendant was convicted in April 2004 of two counts of armed robbery and one count each of first-degree home invasion and possession of a firearm during the commission of a felony, MCL 750.227b. The lower court sentenced him to three concurrent prison terms of 10 to 15 years for each robbery conviction and 12 to 20 years for the home-invasion conviction, as well as to a consecutive two-year term of imprisonment for the felony-firearm conviction. In a prior appeal, this Court affirmed defendant's convictions and sentences for armed robbery and felony-firearm, but remanded for resentencing on the home-invasion conviction. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket No. 256613).

On remand, the lower court again sentenced defendant to a term of 12 to 20 years' imprisonment for the home-invasion conviction, to be served concurrently with the robbery sentences. Defendant again appealed. This Court vacated the sentence for home invasion and remanded for resentencing before a different judge. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket No. 286092).

On second remand, the case was reassigned to another judge and a new presentence report was prepared. At the resentencing hearing, defendant spoke about his positive achievements in prison, including classes he had completed, his helping to facilitate a class, and his rejection of street-life mentality. The trial court summarized the posture of the case, stating,

“the trial court initially had imposed a 10 to 20 year sentence on the armed robbery charge, but . . . the home invasion charge, *which was consecutive to the armed robbery charge*, well exceeded even what the armed robbery sentence was.” The court stated that the “import” of this Court’s prior decisions was “that the 12-year sentence cannot be justified.” The court stated that it would take into account defendant’s representations about the positive changes in his life. The court then resentenced defendant to a prison term of 3 to 20 years for the home-invasion conviction, but ordered the sentence “to run consecutive to the 10 to 20 year sentence on the armed robbery and also consecutive to the two years on the felony firearm.” After advising defendant of his right to appeal, the court commented, “I have taken nine years off your sentence.”

Defendant argues that the trial court erred by ordering his sentence for home invasion to be served consecutively to his sentences for armed robbery.

MCL 750.110a(8) states, “The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.” Thus, when this Court vacated the prior home-invasion sentence and remanded for resentencing, the trial court had discretion to impose a consecutive sentence.

Defendant, however, characterizes the imposition of a consecutive sentence in this case as an enhanced sentence on resentencing that triggers a presumption of vindictiveness, thus requiring the trial court to set forth objective information concerning defendant’s conduct after the original sentencing to justify the increased punishment. We disagree. Indeed, the Michigan Supreme Court has indicated that “where a second sentence is imposed by a judge other than the judge who imposed the original sentence, we should not invoke a presumption of vindictiveness.” *People v Mazzie*, 429 Mich 29, 33, 45, 48; 413 NW2d 1 (1987). Therefore, assuming arguendo that the imposition of a lesser sentence that is ordered to be served consecutively rather than concurrently with another sentence can properly be characterized as more severe, no presumption of vindictiveness arises here because the new sentence was imposed by a different judge.

We agree with defendant, however, that resentencing is nonetheless warranted because the trial court’s statements at sentencing indicate both that it was confused about the nature of defendant’s prior sentences and that the misunderstanding affected the court’s sentencing decision. As noted, in commenting on the posture of the case at the resentencing hearing, the court stated, “the trial court initially had imposed a 10 to 20 year sentence on the armed robbery charge, but . . . the home invasion charge, *which was consecutive to the armed robbery charge*, well exceeded even what the armed robbery sentence was.” This was an inaccurate statement because the original judge did not order the home-invasion and armed-robbery sentences to be served consecutively. Further, this inaccuracy affected the trial court’s sentencing decision. It is apparent that the trial court intended to impose a lesser punishment than had been imposed previously, and that the court believed it had done so, from its statements (1) characterizing this Court’s prior decisions as an indication that a 12-year minimum sentence for home invasion could not be justified, (2) that in resentencing defendant, the court would take into account defendant’s representations about the positive changes in his life, and (3) informing defendant that “I have taken nine years off your sentence.” In reality, by ordering the home-invasion sentence to be served consecutively to the armed-robbery sentences, the court effectively

subjected defendant to a greater period of imprisonment than had been imposed originally, a result that clearly was not intended.

The appropriate remedy under these circumstances is resentencing. Indeed, resentencing is appropriate where, as here, a sentence is based on inaccurate information. See *People v Jackson*, 487 Mich 783, 793; 790 NW2d 340 (2010). Accordingly, we again vacate defendant's sentence for home invasion and remand for resentencing.

Defendant states that this Court should consider whether resentencing should take place before a different judge. Having considered the criteria in *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), we are not persuaded that reassignment is warranted. The court's apparent mistake does not suggest that the court would have difficulty putting aside its views or findings, reassignment is not necessary to preserve the appearance of justice, and reassignment would entail waste and duplication of effort.

Defendant's sentence for first-degree home invasion is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio